72-1060

FILE COPY

Supreme Court, U. S.
FILED
JAN 31 1973
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

72-1060
No. 72-1702

CALVIN SPURGEON JOHNSON,
Petitioner

-vs.-

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

W.H. McELWEE
JOHN E. HALL
MCELWEE & HALL
906 B Street Rear
North Wilkesboro
North Carolina 28659

INDEX

OPINION BELOW 1

JURISDICTION 3

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

REASONS RELIED
FOR THE ALLOWANCE FOR THE WRIT 5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

NO. 72-1702

CALVIN SPURGEON JOHNSON
Petitioner

-vs.-

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE PETITIONER, CALVIN SPURGEON JOHNSON, petitions the Supreme Court of the United States for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review the Judgment and mandate of that court affirming the Judgment of the United States District Court for the Western District of North Carolina.

OPINION BELOW

The Judgment of the Court of Appeals for the Fourth Circuit (Petitioner's Appendix I) is not yet reported.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered on the 11th day of December, 1972. The jurisdiction of this court is invoked pursuant to Title 28 U S C Section 1254.

QUESTIONS PRESENTED

1. Is the "Miranda Warning" required of a Federal officer who had Petitioner under investigation for violation of Federal Penal laws when it appears that the Petitioner is about to incriminate himself?

2. Is the Petitioner entitled to the defense of entrapment wherein a conversation with a Federal officer, he states "A man could do some good if he had somebody to help him, if he had a man too look after him", and the Federal officer replies, "What do you mean, do you want me to look after you?", and thereafter the two agree on a price for the officer to "look after" the Petitioner and the officer with the consent of his superiors accepts money with intent to prosecute the Petitioner?

3. Where a Government agent acting at the direction and knowledge of the government accepts a bribe to be paid in several installments, may the defendant who pays the bribe in several installments, be prosecuted for the payment of each installment or may the government prosecute for only one such bribe even though the bribe was payable in several installments.

STATEMENT OF THE CASE

The Petitioner was tried in the United States District Court for the Western District of North Carolina on an indictment containing eight separate counts. Each count charged the Petitioner with the bribery of one Henry D. Byrd a Special Agent of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service. 18 U S C Section 201 (b) (3). The District Court sitting without a jury entered the verdict of guilty as to each of the indictment.

The evidence may be summarized as follows:

The Federal agent, Henry D. Byrd, had been assigned to investigate the activities of the Petitioner for a long period of time prior to September 21, 1969. On that date, the Petitioner telephoned Byrd at his residence in Charlotte, North Carolina and advised Byrd that he had some information which might be interesting to Byrd. At that time Byrd advised Johnson that he had been assigned to work on and apprehend him for violation of Internal Revenue laws relating to illicit distilled spirits.

Pursuant to this telephone conversation, the Petitioner and Byrd met on September 21, 1969 at Howard Johnson's Restaurant in Charlotte, North Carolina and engaged in a general conversation with respect to certain persons suspected of violating the Internal Revenue laws relating to illicit distilled spirits. Subsequent to this date, the Petitioner and Byrd met on several other occasions and engaged in similar conversations but talked specifically about one particular alleged violator.

On August 3, 1970, the Petitioner and Byrd again had a meeting and on this occasion, the Petitioner advised Byrd of the location of an illicit distillery. They continued

in the conversation with respect to the liquor laws and during said conversation, the Petitioner made the following statement to Byrd, "A man could do some good if he had somebody to help him, if he had a man to look after him". To this statement Byrd made the following reply, "What do you mean, do you want me to look after you?" Byrd then stated to Petitioner that he would think it over and let the Petitioner know. They again met on August 9, 1970, and Byrd than stated to the Petitioner that he had decided to help him. It was on this occasion that the Petitioner and Byrd agreed that the Petitioner would pay Byrd $7,800.00 per year, payable $150.00 per week. The Petitioner paid Byrd $250.00 on that occasion and they agreed that the arrangement would be retroactive to August 1, 1970.

On seven other occasions, the Petitioner and Byrd met wherein the Petitioner paid Byrd a sum of money on the annual arrangement. Each payment relating to a count in the Bill of Indictment.

Byrd at no time ever gave to the Petitioner the "Miranda Warning" although Byrd testified that from and after the meeting on August 3, 1970, that he not only had the Petitioner under investigation for violation of the liquor laws but also for investigation of bribery.

REASONS FOR ALLOWANCE OF WRIT

I

The decision of the Court of Appeals is in conflict with *Miranda v. Arizona*, 384 U S 436, 86 S Ct 1602, 16 L Ed 2d 694,

10 A L R 3d 974; *Mathis v. US*, 391 U S 1, 88 S Ct 1503, 20 L Ed 2d 381; *Orozco v. Texas*, 394 U S 324, 89 S Ct 1905, 22 L Ed 2d 311; *U.S. v. Dickerson*, 413 F 2d 1111 (7 cir); U.S. v. Campos-Serrano, 430 F 2d 173 (7 cir).

The Court of Appeals held that the Miranda Warning was not required to be given to the Petitioner even though he was under investigation for violation of the Federal liquor laws and also for alleged bribery. The Petitioner contends that the Miranda Warning was required under the decisions cited above and the failure to give the Miranda Warning rendered any statement made by the Petitioner inadmissable in the trial of this action.

II

With regard to the issue of entrapment, Petitioner contends that the decision of the Court of Appeals is in conflict with *Sherman v. U.S.*, 356 U S 369, 78 S Ct 819, 2 L Ed 848; *U. S. v. Klosterman*, 248 F 2d 191 (3 Cir).

The Petitioner contends that when the Petitioner stated to the officer, Byrd, "A man could do some good if he had somebody to help him, if he had a man too look after him," that the Federal officer's reply to the Petitioner was the actual commencement of any bribe and not what the Petitioner initially stated to the officer and that therefore the officer initiated the bribery scheme.

III

As to whether Petitioner may be convicted of one crime

or of eight separate crimes, the Petitioner contends that the decision of the Court of Appeals is in conflict with the following decisions: *U. S. Universal CIT Credit Corporation*, 344 US 218, 97 L Ed 260, 73 S Ct 227; *Bell v. U. S.*, 352 U S 322, 1 L Ed 2d 370, 77 S Ct 403.

Petitioner contends that if he committed a crime at all, that it was only one such criminal bribe to pay the sum of $7,8000.00 annually to the officer, Byrd, that the payment of each installment did not constitute a separate crime as was the decision of the Courts below. In this case, the Federal Officer could have made as many different crimes as he would choose if the court permits such a situation. Justice dictates that the prosecution not be permitted to do this.

This is a case of serious importance in the administration of the criminal laws by the Courts of the United States, and the Petitioner respectfully prays that the Court allow the Writ and hear this case.

Respectfully submitted,

W.H. McElwee
John E. Hall

McELWEE & HALL
906 B Street Rear
North Wilkesboro
North Carolina 28659

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 72-1702

United States of America,

Appellee,

v.

Calvin Spurgeon Johnson,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
James B. McMillan, District Judge.

(Decided December 11, 1972.)

Before WINTER, CRAVEN, and BUTZNER, Circuit Judges.

John E. Hall and William H. McElwee on brief for Appellant; Keith S. Snyder, United States Attorney, and David B. Sentelle, Assistant United States Attorney, on brief for Appellee.

PER CURIAM:

Calvin Johnson appeals from a judgment of the district court (McMillan, J.) entered upon his conviction of bribing a Special Agent of the Internal Revenue Service in violation of 18 U S C Sec. 201 (b)(3) . The indictment consisted of eight counts, each of which charged defendant with directly and corruptly giving, offering, and promising to Special Agent Henry D. Byrd, Jr., a sum of money with the intent to induce Byrd to provide defendant with confidential information and to refrain from investigation and prosecuting Johnson in connection with the latter's operation of unlawful distilleries. The eight counts of the indictment corresponded to separate payments made on eight different days occurring between August 9, 1970 and November 23, 1970. Thr trial court modified its original sentence so that Johnson was ultimately sentenced to six months imprisonment of Count I and to a three-year contingent suspended sentence on Counts 2-8 inclusive.

Johnson contends that the district court committed prejudicial error (1) in permitting Special Agent Byrd to testify with respect to conversations he had with Johnson on August 3, 1970 and on August 9, 1970, because Byrd did no inform appellant of his *Miranda* rights; (2) in failing to allow Johnson's defense of entrapment; and (3) in denying Johnson's motion to set aside the verdict as to Counts 2 - 8 of the indictment.

Special Agent Byrd testified at trial that during the conversation of August 3, 1970, Johnson stated to him that " "[i]f a man could just set up and had some help that he might

be able to make some money, might be able to do some good." Record, vol. II, at 17. Byrd reasonably construed this statement to be a bribery offer. After receiving this apparent offer, Byrd received authority from his superiors to continue to contact Johnson and to record their conversations with the view of obtaining evidence sufficient to justify the institution of bribery charges. At the conversation of August 9, 1970, Byrd and Johnson arranged the details of the bribery scheme. Under these circumstances, Byrd's testimony did not violate Johnson's rights under Miranda v. Arizona, 384 U. S. 436 (1966). Johnson was under no compulsion whatever when making the statements attributed to him. Such wholly voluntary, albeit self-incriminating, statements are not protected by the fifth amendment. Hoffa v. United States, 385 U. S. 293 (1966); Todisco V. United States, 298 F. 2d 208 (9 Cir. 1961). Nor was Byrd required to advise Johnson of his right to counsel prior to the August 3 and August 9 conversations, because "[o]ne is not entitled to counsel while committing his crime." Grier v. United States, 345 F. 2d 523, 524, (9 Cir. 1965); Garrett v. United States, 382 F. 2d 768 (9 Cir. 1967).

The district court correctly found Johnson's entrapment argument to be without merit. Byrd's trial testimony relating to the August 3 conversation and the transcript of the August 9 meeting provide substantial evidence that the bribery scheme originated with Johnson, not Byrd. It is settled in this Circuit that the government does not commit entrapment merely by providing an opportunity "for the commission of an offense by one otherwise predisposed to criminal activity. . . ." United States v. DeVore, 423 F. 2d 1069, 1070 (4 Cir. 1970). Here, Byrd did no more than to furnish Johnson with an opportunity to commit bribery after Johnson had demonstrated a predisposition to bribe him. Thus, no entrapment occurred.

Defendant's final contention is that each bribery payment should have been treated as one part of a continuous transaction rather than as a separate offense. The statute applicable to this case makes it a crime to give anything of value to a public official with intent to induce the official "to do or omit to do any act in violation of his lawful duty." 18 U S C Sec. 201 (b) (3). Under this statute each payment by Johnson to Byrd constituted separate violation. In a factual situation very similar to the instant case, the Eighth Circuit held that where the defendants bribed a federal prohibition agent in exchange for protection from prosecution for violations of the National Prohibition Act, each biweekly payment of $500 could be treated as a separate offense, notwithstanding the agreement that each individual payment was but one installment on a total amount of $3,500. Patton v. United States, 42 F. 2d 68 (8 Cir. 1930). See also United States v. Keegan, 331 F. 2d 257 (7 Cir. 1964); United States v. Alaimo, 297 F. 2d 604 (3 Cir. 1961).

For the reasons stated, we find defendant's contentions to be without merit. We dispense with oral argument and affirm the judgment of the district court.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1060

CALVIN SPURGEON JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following trial in the United States District Court for the Western District of North Carolina sitting without a jury, petitioner was convicted on eight counts of having bribed a federal officer in violation of 18 U.S.C. 201 (b)(3). He was sentenced to six months' imprisonment on count one and to a three year suspended sentence on counts two through eight. The court of appeals affirmed in a *per curiam* opinion of December 11, 1972 (Pet. App.). The petition for certiorari was not filed until January 31, 1973 and is therefore out of time under Rule 22(2) of the Rules of this Court. There is in any event no reason for further review.

Petitioner's contentions concerning non-custodial "*Miranda*" warnings, entrapment, and multiple counts in the indictment for each installment payment made on a bribe were raised below and rejected in the opinion of the court of appeals, on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.